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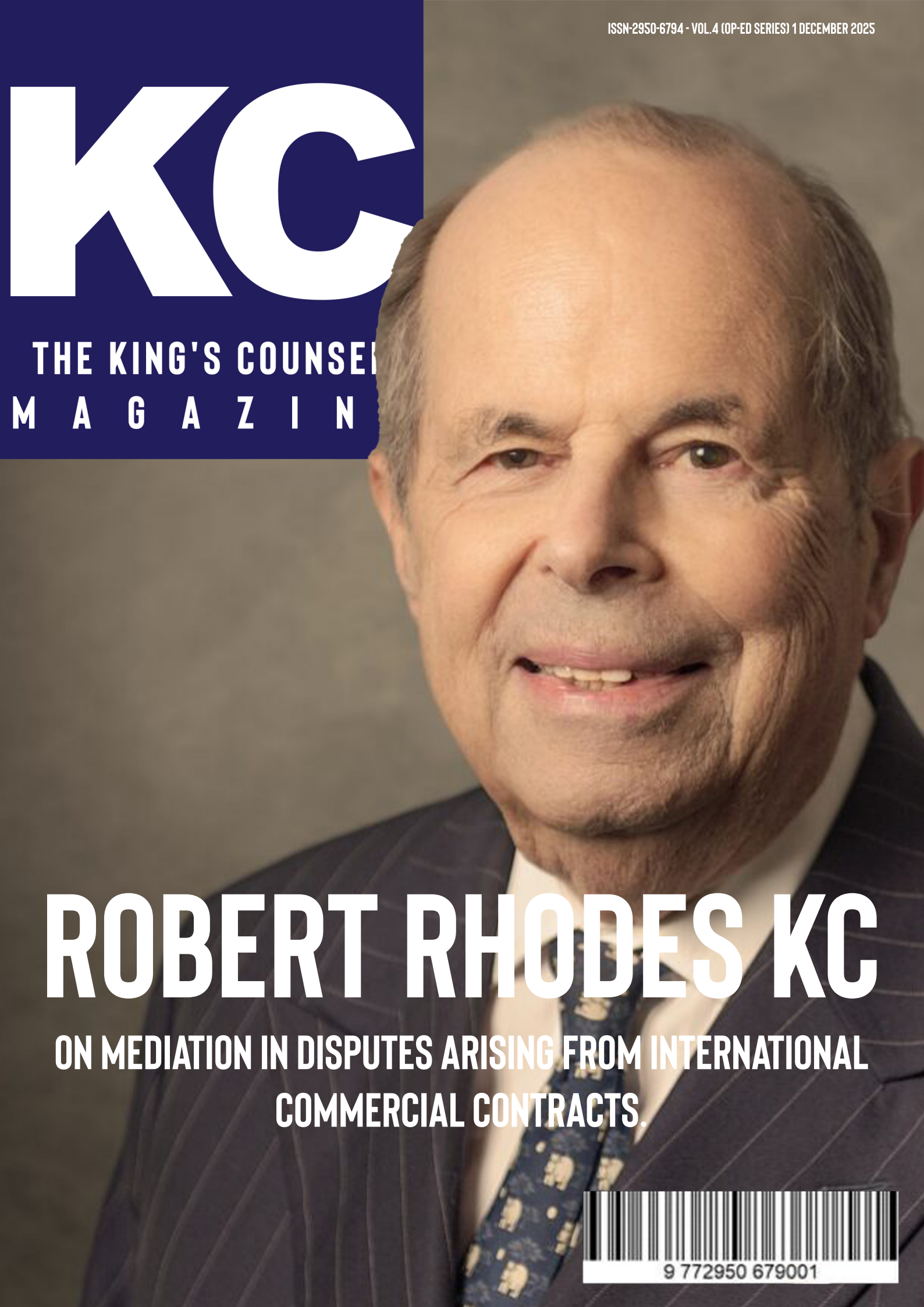

ROBERT RHODES KC

ON MEDIATION IN DISPUTES ARISING FROM INTERNATIONAL COMMERCIAL CONTRACTS.

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OP-ED
ROBERT RHODES KC

THE ADVANTAGES OF MEDIATION IN DISPUTES ARISING FROM INTERNATIONAL COMMERCIAL CONTRACTS.

This article considers the position from the English viewpoint because I am an English lawyer and because many international commercial contracts are subject to English law.

When businessmen enter into contracts, they expect the relationship to go well, and the last thing they expect is for things to go badly wrong. When that does happen, the complaining party will want to get things put right, and so he looks to some form of legal action.

Why should a businessman use mediation in the first place, instead of litigating in the English courts or arbitrating?

There are advantages to litigating in the UK.
English judges are usually both competent and hardworking.
The courts can act immediately in cases of urgency.
The courts have the power to enforce their orders, if necessary by sending a disobedient party to prison for contempt of court.
There are powers to enforce judgments.

But there are considerable disadvantages to litigating in the UK.
It is hugely expensive and time consuming.
Even if your client wins, he is very unlikely to recover more than about 60% of his legal fees, so the case is going to cost him a lot of money anyway, particularly if it goes to appeal. An example is if the claim is for the equivalent of £1,000,000 and your client's total legal costs for the 3 stages of the hearings come to about £1,000,000 he will be likely to get an order for repayment of c£600,000, so even if you get everything back from the other side, the claim ends up only being worth£600,000 and not the £1,000,000 the client originally sued for, because the litigation has cost him net £400,000.

It can take several years before you get a final judgment, once the case has gone through the various levels of appeal. Even then, it is one thing getting a judgment, and another enforcing it. Many losing litigants hide their assets, and it can take years (as well as considerable further expense) to enforce the judgment.

Most British judges are fair, competent and hardworking. But since you can't choose your judge, there is always the risk of getting the exceptional unfair, incompetent or lazy judge.

There are also two potentially very important practical disadvantages to litigation, whatever the result. The first is that, because the courts are open to the public, members of the public can sit in court. So your client has the embarrassment of their hearing the other side's lawyer call him a thief and a liar, or (even worse) hear the judge call him a thief and a liar. The second is that if your client's opponent has been a valued customer, the client will probably want to continue doing business with him. But if you are calling him a thief, he's not likely to want to do any more business with your client. So that is likely to be the end of your relationship.

But there are alternatives to suing in the courts if your client has a commercial dispute in England. The best known are arbitration and mediation. The key difference between them is that arbitration is a dispute resolution mechanism, and mediation is a dispute settlement mechanism.

Arbitration has many advantages:
Like mediation, it is confidential.
You choose who decides the dispute: the arbitrator. If it is just one arbitrator, you decide on who it will be, by agreement with your opponent. If you disagree, then a neutral third party (eg the institution under whose rules the arbitration is to be conducted) will decide who is to arbitrate.

In big cases, there will be a panel of three arbitrators. Each party appoints one, and those arbitrators appoint the third who will act as chairman of the tribunal. If they cannot agree, then once again the relevant arbitration institution will appoint the chairman.

But do not think that, just because you have appointed one of the three arbitrators, he is there simply to represent your client's interests and to argue your case. Unfortunately, some arbitrators do that. But the law is that they should not, and they should be independent, as the Supreme Court has made clear. That was made clear in Jivraj v Hashwani [2011] 1 WLR 1872 SC. There the Supreme Court emphasised that arbitrators do not perform their services or earn their fees under the direction of the parties. They are instead independent providers of services who are not subordinate to the parties who receive their services. At [41] of his judgment, Lord Clarke said:

"The arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the partisan interests of the parties and not to act in, or so as to further, the particular interests of either party. [As the International Chamber of Commerce puts it,] he must determine how to resolve their competing interests…"

Arbitration is based on the agreement of the parties, usually when they make their contract, but it can be at any time. They can agree that normal rules of evidence do not apply, or that there should be no disclosure of documents (which can be a hugely expensive and long process) or that no live witnesses should be called and the arbitration decided simply on the documents, or that there will be a full hearing with witnesses called and cross-examined.

The English courts can only intervene in very limited circumstances:

To decide whether or not an arbitration agreement exists. If there is no binding arbitration agreement, then one party cannot force the other to submit to arbitration.

To help in implementing the arbitration agreement if it does exist, eg by appointing, removing or replacing an arbitrator in limited circumstances.

To issue an injunction (except in limited circumstances) preventing litigation proceedings being brought in breach of an agreement to arbitrate. This quite often happens: there is an arbitration agreement, the parties fall out, one wants to arbitrate, but the other thinks it will do better if it brings litigation in its own country.

To enforce or set aside any award.

To hear appeals from arbitral awards, but only in very limited circumstances: there must be an important legal point, and not just an attempt to get the Judge to decide the facts differently from the

arbitrators. One way in which parties to an arbitration can try to reduce the chances of the losing party appealing to the court is by not asking the arbitrator(s) to give reasons for the award, but simply to make the award.

Arbitral awards can be enforced in any country in the world which is a party to the New York Convention of 1958. More than 170 countries, ranging from Afghanistan to Zimbabwe, have become parties to that Convention. Sri Lanka ratified it without reservation, and implemented it by the Arbitration Act no 11 of 1995.
There are defences to the enforcement of arbitral awards under the New York Convention, but they are limited.

There are, however, disadvantages to arbitration. They include the following three:
Although it is supposed to be cheaper than litigation, that is not always the case. A little while ago, I was counsel in an arbitration which had a 5 day substantive hearing, and the total costs of both sides exceeded £5m. More recently, the English Court of Appeal disclosed that Nigeria's costs in its oil arbitration, where it had overturned an $11bn award against it on the grounds of fraud and bribery, amounted to £43m ie nearly $60m.
If you have a panel of 3 arbitrators, there might be cultural differences and misunderstandings between them which can make for difficulties in agreeing an award.
Most importantly, the arbitrator or arbitrators might be so busy, that they take up to a year or longer before making their award. This is most unsatisfactory for the parties, and unfair on them, because they want to know where they stand. If there is a substantial sum in dispute, that can make a considerable difference to the parties' business plans, eg concerning investment or expansion. The way round this, of course, is to include in the terms of appointment of the arbitrator or arbitrators a provision that they will provide their award within so many weeks or months of the conclusion of the arbitral hearing.
In England, we do not have the process known as med-arb which is available in many civil law jurisdictions. That enables a dispute to move between mediation and arbitration as the adjudicator (as I shall call him) thinks appropriate. This has the advantage of flexibility but the disadvantage that, if your client is involved in a mediation and knows that what he says to the mediator is confidential, the client is likely to disclose to

him things that the client wouldn't want an arbitrator to know because it weakens his case or his bargaining position. So if you are in med-arb, your client will not want to tell the adjudicator during the mediation part of the process what he might have told him if it had simply been a mediation because he fears that it will weaken his case. A way round this problem is to allow one party to object to the adjudicator being the arbitrator if he has also been the mediator.

Mediation

The most common form of mediation is when two or more parties with an apparently unresolvable dispute agree to appoint an independent third party as mediator to try to reach a settlement between them. The overwhelming majority of cases are suitable for mediation, no matter how wide apart the parties appear to be. A skilled mediator can help most parties find an acceptable solution to their problem. Indeed, the English courts are very keen to promote mediation so as to avoid litigation; so much so, that in the UK, Ministry of Justice mediation is compulsory in all claims up to £10,000.

The fundamental point to bear in mind is that in mediation it is not a question of who is right and who is wrong. Nor is it a matter of simply splitting the difference (although this can be the solution). Litigation and arbitration look to the past, but mediation looks to the future. Each party has to ask himself: can I live with a negotiated settlement? If he cannot, then he should continue with his litigation or arbitration. But before he does, he should consider the following four matters:

Cost and speed. Mediation is much cheaper and quicker than litigation or arbitration. In one or two days, you settle the problem, as opposed to having to wait for several months or longer for a trial, while incurring enormous bills (only part of which your client will get back if he wins). The client will be able to get on with growing his business rather than having the distraction of litigation.

Practicality. What if you lose your case when you litigate? Apart from his own costs, your client will almost certainly have to pay a high percentage of his opponent's costs. In addition, even if the client wins, your opponent might appeal, which will cause substantial further delay. Moreover, it is one thing getting a judgment, but (as I have pointed out) it can be quite

another enforcing it, resulting in further cost and delay. Similar considerations apply to arbitration.

How important is the client's relationship with his opponent? If the client wishes to continue that relationship, for example buying from or selling to each other, it will be much easier to do so if he mediates the dispute rather than have lawyers on either side calling the other party liars and cheats.

Confidentiality. Litigation is open to the public and can be reported. Mediation is confidential. That means that, generally speaking, nothing that happens at the mediation can be used in court in the future. Very occasionally confidentiality can be lost, where there is misrepresentation.

Admissions made by the parties during a mediation cannot be used in court later. The mediator cannot be called as a witness. It may well be undesirable to have your client's commercial disputes viewed by the public, eg his competitors, which is a risk of litigation.

The disadvantage of mediation, of course, is that the client will not be getting what he believes is due to him, nor will he be having his day in court to explain to the judge why his opponent is a bad person and has taken unfair advantage of him. But most sensible people will realise that the advantages of mediation far outweigh any disadvantage, and in any event the client does have the opportunity to make an opening statement at a mediation if he wishes.

If the parties do come to a settlement in mediation in England, the lawyers draft an agreement which both parties sign. If one of those parties subsequently regrets signing the agreement and wants to go back on it, the other party can enforce it in the courts. When the 2019 Singapore Convention on Mediation has been signed and ratified by enough states, settlement agreements will be enforceable in third countries, just as the New York Convention allows for arbitral awards.

How you actually go about mediating is another article in itself, but basically there are two forms of mediation: **facilitative** and **evaluative.**

Facilitative is essentially where the mediator acts as a shuttle between the parties, carrying the offers and counter offers between them.

Evaluative is where the mediator gives his confidential views to the parties on the strength of their cases This can be helpful in instilling a sense of reality in the particular party. But there is the danger that a party might think that the mediator has taken against it, and is working for the other side.

There are some cases where litigation or arbitration is necessary, eg where you are arguing over a legal point such as the interpretation of a statute or a contract. But my advice to virtually any person involved in a legal dispute would be to try mediation. People are often surprised at how successful the process can be, no matter how wide apart the parties appear to be. Some time ago, I mediated a case where the parties had a week set aside for a trial in the High Court 4 weeks after the mediation. It took me 8 hours, but I eventually was able to get the parties to agree to a settlement.

Even if the mediation does not result in a settlement on the day, it often happens that the points discussed during the attempted mediation develop in the parties' subconscious, and after a few days they decide that maybe they can reach a settlement.

At the least, a failed settlement meeting often results in the narrowing of issues for any continued litigation or arbitration, and so a reduction in cost.

In any event, if the mediation does not result in a settlement, the parties can still always arbitrate or litigate. It is common for so-called "step clauses" to be inserted into commercial contracts, providing for various stages of negotiation (including mediation) before getting to the stage of arbitration or litigation.

Lawyers might say: this is all very well, but we have to earn a living, and if we settle every dispute by mediation we shall lose an awful lot of legal fees. In the short term, that is right. But if they do manage successfully to mediate clients' disputes, they will be likely to have very grateful clients who will recommend them to friends of theirs who have legal problems, and so their practice and reputation will grow.

The last point I would make is this: people often overlook the considerable mental strain that litigation or arbitration can cause people. Parties to

litigation or arbitration sometimes become obsessed with their case, and the longer proceedings continue, the worse it gets.
In summary, my view is that mediation is a no-brainer for anyone with any legal dispute , let alone an international one.

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